No. 95-120

Supreme Court, U.S.
FILED
AUG 30 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOAN CARSTENSEN,

Petitioner,

v.

BRUNSWICK CORP., MERCURY MARINE CORP., AND SEA RAY BOATS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Boat Safety Act of 1971 preempts a state common law requirement that all recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety.

RULE 29.1 STATEMENT

Respondent Brunswick Corporation has the following subsidiaries (other than wholly-owned subsidiaries): Doellwood Financial, Inc.; Enhanced Energy Systems, Inc.; Intellitec International Inc.; Jewon, Co., Ltd.; Juangxi Marine Company, Limited; Merc Spader, Inc.; Nippon Brunswick Kabushiki Kaisha; Nireco Corporation; Sugita Seisakusho Co., Ltd.; Texas Lounge Operations, Inc.; Texas Thousand Oaks, Inc.; Tohatsu Marine Corporation; and Wayne Recreation Center Lounge, Inc.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioner urges this Court to grant certiorari and reverse summarily because of a purported conflict between the Eighth Circuit's decision in this case and the recent decision in *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483 (1995). There is in fact no conflict. This case involves a statutory and regulatory scheme — under the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 ("Boat Safety Act") — that is completely different from the motor vehicle safety regime at issue in *Myrick*. Petitioner offers no plausible reason why the Court should review this unexceptional decision, which follows a long line of federal and state court decisions finding federal preemption under the Boat Safety Act.

STATEMENT

A. The Boat Safety Act and Federal Preemption

The Boat Safety Act was enacted by Congress to "reduce the level of fatalities now resulting from boating mishaps" by establishing "a coordinated national boating safety program." S. Rep. No. 92-248, 92d Cong., 1st Sess. 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333 ("Senate Report"). The safety program created by the Boat Safety Act requires manufacturers to comply with "national construction and performance standards for boats and associated equipment" established by the United States Coast Guard.[1] *Id.* at 15; see 46 U.S.C. § 4302(a)(1) (authorizing "minimum safety standards for recreational vessels and associated equipment"). In considering whether to adopt a safety standard, the Coast Guard is required to "consult with" the National Boating Safety Advisory Council ("the NBSAC" or "Committee"), 46 U.S.C. § 4302(c)(4), a group of experts and other persons interested in boat safety established by the Act, 46 U.S.C. § 13110.[2]

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[1] The safety standards are "promulgated by the Secretary of the Department in which the Coast Guard is operating — presently the Secretary of Transportation." Senate Report at 6.

[2] The 21 members of the NBSAC, who are appointed by the Secretary of Transportation, must be individuals who have particular expertise, knowledge, and experience in recreational boating safety. 46 U.S.C. § 13110(a). The NBSAC members are selected from, and represent, three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of recreational vessel manufacturers and associated equipment manufacturers; and (c) seven representatives of national recreational boating organizations and the general public. *Id.* at § 13110(b)(1).

Congress declared that the safety program established by the Boat Safety Act must be based on uniform national standards:

> The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level.

Senate Report at 14. To achieve national uniformity, and in deference to the "long history of preemption in maritime safety matters" (*id.* at 20), Congress included the following broad preemption provision in the Act (46 U.S.C. § 4306):

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

By mandating that state laws and regulations be "identical" to regulations issued by the Coast Guard, the preemption section of the Boat Safety Act insures that boat manufacturers need not be concerned about "compliance with widely varying local requirements." Senate Report at 20. The statute does allow the states some latitude to "impose requirements with respect to carrying or using marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances."

Ibid.[3] The preemption section reserves to the Coast Guard, however, a "right of disapproval" over these state requirements "to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity." *Ibid.*

The Boat Safety Act also includes a so-called "savings" clause, which provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). The Senate Report on the Act states (at 32) that the "purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability."

B. The Coast Guard's Decision Not to Require Propeller Guards

In 1988, the Coast Guard requested the NBSAC to consider whether propeller guards should be required on recreational vessels. The Coast Guard's charge to the Committee asked it to:

* Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water.

* Assess the arguments for and against some form or mechanical guard to protect against propeller strikes reflecting the positions of state boating law administra-

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[3] The Boat Safety Act also "does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." Senate Report at 20.

tors, the recreational boating industry, and the boating public.

National Boating Safety Advisory Council, *Report of the Propeller Guard Subcommittee* ("Subcommittee Report") App. A (R. 57).[4] In particular, the Coast Guard asked the Committee whether there should be "a federal requirement for some form of propeller guard." *Ibid.*

In response to the Coast Guard's request, the NBSAC established a special five-person Propeller Guard Subcommittee to consider the issue after gathering information from a wide range of public and private sources. *Id.* at 1 (R. 30). The Subcommittee received and reviewed files and information supplied by the Coast Guard. *Ibid.* In addition, the Subcommittee solicited and reviewed "files, data, case histories and other information" from diverse individuals and organizations interested in boat safety, *ibid.*; *id.* at Apps. B-C (R. 59-67), including representatives of boat manufacturers and counsel representing injured persons in product liability actions. *Id.* at 3-4 (R. 32-33).[5]

During its extensive fact-finding activities conducted over more than a year, the Subcommittee held public meetings across the country, providing interested persons and organizations the opportunity to present testimony on whether propeller guards should be required by the Coast Guard. *Id.* at

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[4] "R." refers to the Joint Appendix filed in the court of appeals.

[5] At least six of the 24 individuals contacted by the Subcommittee were either attorneys or expert witnesses retained by plaintiffs in product liability litigation to advocate the use of propeller guards. Subcommittee Report at App. B (R. 59-61). Indeed, one of the lawyers representing the petitioner in this case, R. Ben Hogan, III, was contacted by the Subcommittee and made written and oral presentations to the Subcommittee. *Id.* at App. B, 2 (R. 60), App. C (R. 63-67), App. D. (R. 69-70)

App. D (R. 69-71). In its comprehensive review, the Subcommittee examined "[v]arious types of propeller guards, both commercially available and experimental, underwater motor housing appendages and other relevant materials," and operated boats equipped with and without guards. *Id.* at 2 (R. 31).

Evidence produced to the Subcommittee indicated that "boating fatalities involving the propeller" number "approximately 30-49 * * * per year." *Id.* at App. E, 1-2 (R. 73-74). "On an absolute basis this is one third to one half the number of fatalities associated with being struck by lightning." *Id.* at App. E, 2 (R. 74). Indeed, in light of the large number of people who use recreational vessels each year (the "boat population" of the United States exceeded 17 million in 1988, *id.* at 9 (R. 38)), the number of propeller incidents is small compared to the total number of boating accidents. *Id.* at 10 (R. 39), App. E (R. 76); see *id.* at 23 (R. 52) ("the propeller itself is the sole factor only in a minority of impacts").[6]

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[6] Petitioner cites (Pet. 5) a study on propeller-strike incidents, *Motorboat Propeller Injuries*, published in part by a plaintiffs' advocacy group (the Institute for Injury Reduction), that was not a part of the record established by the NBSAC. Moreover, petitioner overstates the number of fatalities and injuries caused by propeller accidents in citing the Coast Guard's "*Boating Statistic* category 'struck by boat of [*sic*] propeller.'" Pet. 5. The category is actually "struck by boat *or* propeller." Subcommittee Report at App. E, 1 (R. 73) (emphasis added); see also *id.* at 5 (R. 34) (noting that manufacturers have shown that a "very high percentage of the reported accidents of 'struck by boat or propeller' do not involve propeller strikes, but involve impacts with the boat hull or a stationary component of the lower unit"). The evidence produced to the Propeller Guard Subcommittee indicated that approximately 49 fatalities per year are grouped in this category, but that "[e]stimates show that boating fatalities involving the propeller are probably closer to 30 per year." *Id.* at 1 (R. 73).

After its extensive fact-finding was completed, the Subcommittee unanimously adopted a lengthy Report, which concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 24 (R. 53). Among the significant safety concerns supporting this recommendation were the lack of a feasible propeller guard for any pleasure craft traveling at normal operating speeds, serious steering and handling problems caused by propeller guards (along with increased drag and loss of speed), and safety problems concerning underwater impacts by propeller guards. *Id.* at 12-17 (R. 41-46), 20-21 (R. 49-50).[7]

In light of these substantial adverse safety consequences, the Report concluded that "[t]he development and use of devices such as 'propeller guards' can, therefore, be counter-productive and can create new hazards of equal or greater consequence." *Id.* at 23 (R. 52). *In short, propeller guards*

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[7] "After considering the available data on propeller strike accidents [and] the testimony of numerous experts, the subcommittee determined that propeller guards are not feasible for recreational boats because they decrease an operator's ability to maintain control over the boat at 'normal' speeds, *increase* the probability of striking a body in the water, and create a possibility of causing greater injury to those struck." *Mowery* v. *Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991) (emphasis in original).

In addition, while propellers "present the hazard of cutting wounds and penetration of the body," propeller "guards (which increase significantly the potential impact area) present the additional hazard of blunt trauma injuries, which are often more severe." Subcommittee Report at 18-19 (R. 47-48). For example, "a skull impact at 10 mph or more in the water would be generally fatal." *Id.* at 17 (R. 46).

The Subcommittee Report also noted that so-called "ring-type guards" create "a new hazard" of arms and legs being "caught by the bars or rings and held against the rotating propeller." *Id.* at 20-21 (R. 49-50).

would make boats less safe.[8] As a consequence, the Subcommittee recommended that the Coast Guard not require propeller guards and cautioned that the "boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce * * * injuries or fatalities." *Id.* at 24 (R. 53).

The full NBSAC considered the Subcommittee's Report at its meeting in November 1989. See *Minutes of the 44th Meeting of the National Boating Safety Advisory Council* at 17-19 (Nov. 6-7, 1989) (R. 101-103). All 21 members of the Committee, representing state governments, boat manufacturers, and the interested public (see note 2, *supra)*, voted to adopt the Report and its conclusions and recommendations. *Id.* at 19 (R. 103). The Report and all of the documentary materials reviewed by the Propeller Guard Subcommittee were then forwarded to the Coast Guard. Subcommittee Report at 1 (R. 30).

After considering these voluminous materials, the Coast Guard decided to accept all of the recommendations of the NBSAC and the Subcommittee Report. Pet. App. 12. In particular, with respect to the NBSAC's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard concluded that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards.*" *Ibid.* (emphasis added). At the same time, the Coast Guard announced that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices or other information on the state of the art." *Id.* at 13.

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[8] For this reason, it is not surprising that, as petitioner concedes, "no major marine engine manufacturer ha[s] equipped any of its boats with any type of propeller guard." Pet. 5.

Not surprisingly, the courts that have considered claims such as petitioner's on the merits have reached the same conclusion as the Coast Guard regarding the feasibility and safety of propeller guards. In *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991), for example, the Eleventh Circuit commented that "[b]oth parties' witnesses * * * testified regarding potential difficulties that these devices might engender" and that "[b]oth parties' experts * * * explained that guards themselves can become a danger as they move through the water." 903 F.2d at 1509. Based on this undisputed evidence, the Eleventh Circuit concluded (*ibid.*; emphasis added):

> [C]urrent industry standards, and the federal regulations, simply reflect the consensus of experts that the industry's adaption of propeller guards at this point *would not only be infeasible, but unwise, unsafe and unfortunate*.

To the same effect are *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993)("the record shows * * * the absence of evidence that there was a feasible, safer alternative design for a propeller guard"), and *Pree* v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir.), cert. denied, 114 S. Ct. 65 (1993)("[e]xperts for both sides * * * testified regarding the potential difficulties that propeller guards might engender"). State courts have reached the identical result. See, *e.g.*, *Fitzpatrick* v. *Madonna*, 424 Pa.Super. 473, 623 A.2d 322 (1993); *Beech* v. *Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991).

C. The Proceedings Below

Petitioner Joan Carstensen was injured in 1989 when she fell out of a boat manufactured by respondents and was struck by the engine's propeller. Pet. App. 1-2. She brought a diversity action in federal court seeking damages from respondents under state law theories of negligence, strict liability, and breach of warranties based on respondents' "fail[ure] to design, manufacture, or equip the boat and

engine with a propeller guard." Pet. 9; Pet. App. 2. The district court concluded that petitioner's claims were preempted by the Boat Safety Act and granted respondents' motion to dismiss. *Id.* at 8-11.

The court of appeals affirmed. Pet. App. 1-7. The Eighth Circuit found that the Coast Guard had "specifically rejected proposed regulations requiring the use of propeller guards" and that this decision "has the same preemptive force as a decision to regulate." *Id.* at 3. The court concluded that petitioner's claims were preempted by the Boat Safety Act because "[a]ny state law or regulation requiring manufacturers to install propeller guards would not be identical to the Coast Guard regulatory position." *Id.* at 4.

The court of appeals rejected petitioner's argument that common law actions are not included within the scope of the Boat Safety Act preemption clause. Relying on this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992), the Eighth Circuit found "'no distinction between positive enactments and common law.'" Pet. App. 4. "Allowing a jury to assess damages for failure to install a propeller guard would create, in effect, a state requirement that guards be installed. State damage actions based on such failure would establish a regulation 'imposing a requirement for associated equipment' that is not identical to th[e] [requirement] prescribed by the Coast Guard." *Ibid.* The court also rejected petitioner's argument that the Act's savings clause precluded federal preemption of her claims. *Id.* at 4-6.

REASONS FOR DENYING THE PETITION

After an extensive public investigation, the Coast Guard concluded that, for safety reasons, propeller guards should not be required on boats. Invoking exaggerated claims of the "'devastation'" caused by boat propellers (Pet. 5; see note 6, *supra*), petitioner seeks to second-guess that federal determination and impose state law liability on respondents for not including a propeller guard on the boat that stuck her. This

proposed common law rule, however, is plainly preempted by Section 4306 of the Boat Safety Act, because it is "not identical" to a considered decision made by the Coast Guard not to mandate propeller guards. Moreover, even in the absence of express preemption, petitioner's claim would be impliedly preempted because it conflicts with and frustrates the purpose of the federal boat safety scheme. Not surprisingly, virtually every court to consider the question has agreed with the courts below that common law claims such as petitioner's are preempted by the Boat Safety Act.[9]

I. THE DECISION IN THIS CASE DOES NOT CONFLICT WITH *MYRICK*

Petitioner's principal contention (Pet. 11-16) is that the decision below should be summarily reversed because it conflicts with this Court's recent decision in *Myrick*, which petitioner alleges "made clear that the mere absence of federal regulation with respect to a particular product has no preemptive effect whatsoever." Pet. 11. Despite petitioner's best efforts to squeeze this case into the limited holding of *Myrick*, the cases are fundamentally different and easily reconciled.

A. In *Myrick*, the Court interpreted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 ("Motor Vehicle Safety Act"), and Federal Motor Vehicle Safety Standard 121, 49 C.F.R. § 571.121

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[9] See *Ryan* v. *Mercury Marine*, 531 N.W.2d 793 (Mich. App. 1995); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Motor Corp.*, No. J90-0011(L) Slip. Op. at 2 (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993).

("Standard 121"), adopted by the National Highway Traffic Safety Administration ("NHTSA"). The Motor Vehicle Safety Act has a preemption clause (15 U.S.C. § 1392(d)), which provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Standard 121 at issue in *Myrick* "imposed stopping distances and vehicle stability requirements for trucks." 115 S. Ct. at 1486. Because of the short stopping distances required by the standard, "several manufacturers notified NHTSA that ABS [anti-lock braking systems] would be required" to comply with Standard 121. *Ibid.* On judicial review of Standard 121, the Ninth Circuit suspended the standard because "NHTSA had failed to consider the high failure rate of ABS devices * * * [and] 'there [was] a strong probability that [ABS] had created a potentially more hazardous highway situation * * *.'" *Id.* at 1486 (quoting *Paccar, Inc.* v. *NHTSA*, 573 F.2d 632, 642-643 (9th Cir.), cert. denied, 439 U.S. 862 (1978)). Thereafter, NHTSA amended Standard 121 "so that the stopping distances and lock-up requirements no longer applied to trucks and trailers." 115 S. Ct. at 1486.[10]

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[10] NHTSA "left the unamended Standard 121 in the Code of Federal Regulations so that the 'affected sections [could] most easily be reinstated' when the agency met *Paccar*'s requirements. * * * NHTSA also stated that the provisions would remain in place so that manufacturers would know 'what the agency still considers to be reasonable standards for minimum acceptable performance.'" 115 S. Ct. at 1486 (citations omitted).

The plaintiffs in *Myrick* were involved in accidents with trucks manufactured by the defendants. The plaintiffs brought suit, "alleg[ing] that the absence of ABS was a negligent design that rendered the vehicles defective." 115 S. Ct. at 1485. The defendants contended that these tort claims were both expressly and impliedly preempted by the Motor Vehicle Safety Act, but this Court rejected those arguments.

The Court began its analysis with the Motor Vehicle Safety Act's preemption clause, which "applies only '[w]henever a Federal motor vehicle safety standard * * * is in effect' with respect to 'the same aspect of performance' regulated by a state standard." 115 S. Ct. at 1487. Because "Standard 121 remains suspended," the Court concluded that "[t]here is simply no minimum objective standard stated at all," and the states were therefore free to adopt their own standards addressing the same issue. *Ibid.* Specifically, the Court found

> no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, *the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes*.

Ibid. (emphasis added). Because the Court determined that there was no federal standard in effect, and that the absence of a standard did not indicate that federal authorities intended the area to be unregulated, it concluded that there was no express preemption (*ibid.*) and no implied conflict preemption (*id.* at 1487-1488).

B. This case is markedly different from *Myrick* in several critical respects. Here, unlike in *Myrick*, there is conclusive evidence that "the lack of federal regulation * * * result[ed] from an affirmative decision of agency officials to refrain from" requiring propeller guards. 115 S. Ct. at 1487. This was not, as petitioner suggests, a cavalier decision by

the Coast Guard based on cursory "internal deliberations." Pet. 15. The record to the contrary is overwhelming: a year-long investigation of propeller-strike incidents and data by a federal advisory committee (the Propeller Guard Subcommittee of the NBSAC), with nationwide public hearings and voluminous documentary evidence, culminating in a lengthy report recommending — *for reasons of safety* — that there should be "no regulatory action to require propeller guards." See pages 4-9, *supra*.[11]

The Coast Guard, after reviewing the Report and all of the evidence accumulated by the NBSAC, independently concluded that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motor boats." Pet. App. 12. As the court observed in *Stanley* v. *Bertram-Trojan, Inc.*, 855 F. Supp. 657, 658 (S.D.N.Y. 1994), "propeller guards were specifically considered by the Coast Guard as a subject of regulation and were found not feasible because they may increase danger rather than reduce it."

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[11] In light of the extensive Coast Guard proceedings, which included notice of public meetings in the Federal Register and a written ruling announcing the final agency decision, petitioner's assertion (Pet. 8) that "[t]he Coast Guard's decision not to regulate propeller guards was not the product of any formal rulemaking proceeding" is preposterous. See also Pet. 15 ("there was no rulemaking of any sort"). The Coast Guard took pains "to insure that the public [was] given an opportunity to participate in the rulemaking and [was] notified of its results." Pet. 6 n.3. Indeed, as noted earlier (see note 5, *supra*), *petitioner's counsel took an active role in those proceedings*. Petitioner apparently would require the Coast Guard to take the senseless step of issuing a regulation stating its intention *not* to regulate — a result required neither by the Boat Safety Act (see note 15, *infra*) nor by preemption law generally. Petitioner cites no support for her illogical position.

The Coast Guard's decision on grounds of safety not to require propeller guards was not, as petitioner would have it, "mere federal regulatory inaction, without more." Pet. 13. It was precisely the kind of federal "inaction *joined with action*" that this Court in *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (emphasis added), held preempts state law. In that case, the Court stated (*ibid.* (emphasis in original)):

> [D]eliberate federal inaction [does not] always imply pre-emption * * *. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field [unregulated], *then* the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action.

And this Court has repeatedly held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphases in original); see also *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989).[12]

In this case, the Boat Safety Act and accompanying Coast Guard regulations — "a comprehensive federal scheme," *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 503 — intentionally left propeller guards unregulated. In light of the voluminous record documenting the federal decision to leave

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[12] "'[W]here failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted * * * to enact such a regulation." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

propeller guards unregulated, "the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action." *Ibid.*[13]

In sum, this case is fundamentally different from *Myrick*, where there was no "affirmative decision of agency officials to refrain" from regulation. 115 S. Ct. at 1487.[14] The Coast Guard made an "affirmative decision," based on considerations of safety, that propeller guards should *not* be required on recreational boats. The state law rule advocated by petitioner, which would mandate propeller guards, is not "identical" to a federal regulation and is therefore expressly preempted by Section 4306 of the Boat Safety Act; and it is impliedly preempted because it conflicts with and would frustrate the federal policy adopted by the Coast Guard.[15]

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[13] Contrary to petitioner's assertion, the Eighth Circuit did not decide that "*any* federal decision not to regulate" preempts state law (Pet. 16 (emphasis in original)). In this case there was overwhelming evidence of an "affirmative decision" by an expert federal agency not to require propeller guards for safety reasons. See 115 S. Ct. at 1487.

[14] Indeed, in *Myrick* NHTSA plainly wanted to regulate stopping distances and vehicle stability, but was precluded by a court decision from doing so. See page 12, *supra*. Clearly the agency's policies were not frustrated by a state law requirement addressing those aspects of vehicle performance.

[15] Petitioner argues (Pet. 15) that "Congress clearly intended that only properly promulgated regulations would exert preemptive force under the Act." That reading, however, is belied by the language of the express preemption provision of the Boat Safety Act, which preempts any state law or regulation that "is not identical to a regulation *prescribed* by the Coast Guard" (46 U.S.C. § 4306) (emphasis added).

Contrasting this language with the preemption clause interpreted in *Myrick* illustrates petitioner's fundamental misreading

II. THERE IS NO CONFLICT IN THE LOWER COURTS MERITING REVIEW BY THIS COURT

Petitioner also contends (Pet. 16-17) that review by this Court is necessary to resolve a "clear split between the Eighth Circuit and the Texas Supreme Court" on the preemption of propeller guard tort claims under the Boat Safety Act. Indeed, petitioner suggests that there is a broad split "in divergent lower court decisions regarding the scope of preemption" under the Act. *Id.* at 19. Petitioner's claim of deep divisions in the lower courts is wholly illusory.

Virtually every federal and state court to address the issue has concluded that a state law claim that a boat was defective because its engine lacked a propeller guard is preempted by the Boat Safety Act.[16] In the face of this overwhelming authority, petitioner cites a single decision by the Texas Supreme Court that is premised, in large part, on

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of both. *Myrick* construed the Motor Vehicle Safety Act's preemption provision, which preempts state law only when a federal safety standard "is in effect" (15 U.S.C. § 1392(d)). In *Myrick*, the absence of a federal regulation under the Motor Vehicle Safety Act meant that the "States remain[ed] free to 'establish, or to continue in effect,' their own safety standards." 115 S. Ct. at 1487. By contrast, the Boat Safety Act, read literally, provides that in the absence of a federal regulation the states are *not* free to regulate. (Here, of course, we have not just the mere absence of a federal regulation but the considered decision of the Coast Guard not to regulate, for reasons of safety.)

[16] See note 9, *supra*. Petitioner cites *Eggen* v. *Griffith*, No. B-C-89-31 (E.D. Ark. May 28, 1991), an unpublished opinion holding that a "no-propeller-guard" claim was not preempted by the Boat Safety Act. See Pet. 19. That decision, of course, has now been overruled by the Eighth Circuit's decision in this case. Petitioner's other two cases (*Mulhern* and *Rubin*) are intermediate state court decisions that are readily distinguishable, as the court below explained. See Pet. App. 6; note 23, *infra*.

a cramped view of federal preemption that was subsequently rejected by this Court in *Myrick*.

In *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), cert. denied, 115 S. Ct. 664 (1994), the court held that a "no-propeller-guard" tort claim was not preempted by the Boat Safety Act. The Texas court "recognize[d] that [its] holding conflicts" with a long line of federal and state court decisions. *Id.* at 252. Nonetheless, the court did not find these decisions "persuasive," in light of "the Supreme Court's apparent turn to stricter preemption analysis." *Ibid.* The "apparent turn" in preemption analysis was, in fact, the decision of the Eleventh Circuit in *Myrick*, which misread this Court's decision in *Cipollone* to "question[] the propriety of an implied preemption analysis when presented with an express preemption clause." 889 S.W.2d at 251 n.10.

This Court flatly repudiated the Eleventh Circuit's analysis in *Myrick*, holding that the presence of an express preemption clause "does not mean that the express clause entirely forecloses any possibility of implied preemption." 115 S. Ct. at 1488. Thus, the continuing validity and relevance as a precedent of the Texas Supreme Court's decision in *Moore* is completely undermined. Moreover, other aspects of the decision in *Moore* conflict with decisions of this Court in several important respects.

A. First, the *Moore* court held (and petitioner argues in passing (Pet. 17)) that the Boat Safety Act's preemption of any state "law or regulation" does not include state common law claims. See 889 S.W.2d at 249-250 ("declin[ing] to read 'law or regulation' so broadly as to include common-law claims"). This holding is wholly at odds with this Court's decision in *Cipollone*, which eliminated any doubt about whether the state "law or regulation" referred to in the preemption provision of the Act, 46 U.S.C. § 4306, includes state common law.

The Court in *Cipollone* held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J.). The *Cipollone* Court held that it made no difference that the preemption clause failed to refer expressly to common law claims, because "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" *Id.* at 2620 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)). See, *e.g.*, *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1737 (1993) ("[l]egal duties imposed * * * by the common law fall within the scope of the[] broad phrases" "law, rule, regulation, order, or standard"); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972) ("[w]e see no reason not to give 'laws' its natural meaning * * *, and therefore conclude that * * * [it embraces] claims founded upon common law as well as those of statutory origin"); *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 71 (1938) ("law" includes "the unwritten law of the State as declared by its highest court").[17]

Since the decision in *Cipollone*, the widely accepted understanding among the federal courts of appeals is that statutory language generically preempting state "law" or "requirements" necessarily includes claims based on state common law.[18] This is the uniform view of the courts

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[17] See also *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

[18] See *National Bank of Commerce of El Dorado* v. *Kimberly-Clark Corp.*, 38 F.3d 988, 991 (8th Cir. 1994); *Gile* v. *Optical Radiation Corp.*, 22 F.3d 540, 542 (3d Cir.), cert. denied, 115 S.

deciding preemption questions under the Boat Safety Act. And the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of express preemption clauses in numerous other federal health and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136, *et seq.*,[19] the Federal Hazardous Substances

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Ct. 429 (1994); *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748-749 (4th Cir. 1993); *King* v. *E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 114 S. Ct. 490 (1993); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 114 S. Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), cert. denied, 114 S. Ct. 60 (1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993).

[19] See, *e.g.*, *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham* v. *Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen* v. *Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co.* v. *MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597, 601 (D. Idaho 1994); *Quad R Farms* v. *American Cyanamid Co.*, 840 F. Supp. 694 (D. Minn. 1993); *DerGazarian* v. *Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich* v. *Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque* v. *Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper* v. *E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson* v. *Dow Chem. Co.*, No. Civ. A. 92-30, 1992 WL 404681, *2 (E.D. Ky. Oct. 19, 1992); *Brennan* v. *Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *Yowell* v. *Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *June* v. *Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993), aff'd, No. 70011, 1994 WL 601588 (N.Y. App. Div. Nov. 3, 1994); *Hopkins* v. *Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-146 (N.C. Ct. App. 1993).

Act, 15 U.S.C. §§ 1261, *et seq.*,[20] and the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 360c, *et seq.*[21]

In sum, this ground for the decision in *Moore* is an aberration. The Eighth Circuit's conclusion that the reference to state "law" in the preemption clause of the Boat Safety Act encompasses state common law is fully in accord with the decisions of this Court and virtually every other court. There is no reason for further review.

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[20] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 113 S. Ct. 2999 (1993); *DeHaan* v. *Whink Prods. Co.*, No. 91 C 0014, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar* v. *Whink Prods. Co.*, No. 93CA0055, 1994 WL 115876, *2 (Colo. Ct. App.), cert. denied, 115 S. Ct. 1315 (1994); *State ex rel. Jones Chems., Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994).

[21] See, *e.g.*, *Michael* v. *Shiley, Inc.*, 46 F.3d 1316, 1320 (3d Cir. 1995), petition for cert. filed, 63 U.S.L.W. 3874 (June 2, 1995) (No. 94-1971); *Mendes* v. *Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King* v. *Collagen Corp.*, 983 F.2d 1130, 1135 (1st Cir.), cert. denied, 114 S. Ct. 84 (1993); *Slater* v. *Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), cert. denied, 113 S. Ct. 327 (1992); *Richman* v. *W.L. Gore & Assoc., Inc.*, 881 F. Supp. 895 (S.D.N.Y. 1995); *Bokis* v. *American Medical Sys., Inc.*, 875 F. Supp. 748, 751 (W.D. Ok. 1995); *Mitchell* v. *Collagen Corp.*, 870 F. Supp. 885, 887 (N.D. Ind. 1994); *Griffin* v. *Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker* v. *Collagen Corp.*, No. 93 C 2375, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994); *Kemp* v. *Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter* v. *Zimmer, Inc.*, 830 F. Supp. 199, 203 (S.D.N.Y. 1993); *Cameron* v. *Howmedica, Div. of Pfizer Hosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker* v. *Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992), aff'd, 5 F.3d 1489 (3d Cir. 1993); *Covey* v. *Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D. Ohio 1993).

B. In rejecting federal preemption under the Boat Safety Act, the *Moore* court also relied (889 S.W.2d at 250), as does petitioner (Pet. 17), on the Act's so-called "savings" clause, 46 U.S.C. § 4311(g) (compliance with federal standards or regulations "does not relieve a person from liability at common law"). The Texas Supreme Court maintained that this clause shelters common law claims from preemption.[22]

Section 4311(g), however, was not intended by Congress to restrict the scope of preemption. Instead, as its narrow language suggests, the section negates only an affirmative defense of compliance with a government standard. As the Senate Report on the Boat Safety Act states (at 32), the "purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability." Indeed, although petitioner asserts that Section 4311(g) is an "express *anti*-preemption provision" (Pet. 3), it is not even included in the part of the Act (Section 4306) that addresses federal preemption. See *Easterwood*, 113 S. Ct. at 1736.

Even if it were viewed as a limitation on the Boat Safety Act's broad preemption provision, the "savings" clause indicates, at most, Congress' intent not to occupy the entire field of boat safety, so that common law claims could continue to be brought in areas not covered by a federal

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[22] The statute in *Cipollone*, unlike the Boat Safety Act, lacked a savings clause. The mere presence of a savings clause in the Boat Safety Act cannot be dispositive on the issue of federal preemption, however, because this Court found express preemption of common law claims in *Easterwood*, 113 S. Ct. at 1736-1737, and the statute at issue in that case had a savings clause. See also *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-2040 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

safety standard. Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state law claims that conflict with federal law. *Id.* at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has consistently adhered to these pronouncements. See, *e.g.*, *Morales*, 112 S. Ct. at 2037; *International*

Paper Co. v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976). Consistent with these precedents, Section 4311(g) was added to the Boat Safety Act not to defeat the statutory goal of creating a nationally uniform boat safety program, but rather to indicate Congress' intent not to preempt the remainder of the field of boat safety (such as safe boat operation and use, see note 3, *supra*) *not* covered by and *not* inconsistent with that federal program.[23] Petitioner's perverse reading of the "savings" clause, which would allow states to overrule Coast Guard determinations, would cause the Act to "destroy itself."

C. Finally, the *Moore* court relied on the traditional "presumption against preemption [of] * * * state regulation of health and safety matters" (889 S.W.2d at 249) and deferred to "the significant state interests at issue" in the case. *Id.* at 251. This deference to state interests and the presumption against preemption are entirely misplaced in the context of the Boat Safety Act, which implicates the "historic federal maritime jurisdiction." Senate Report at 17. Indeed, in adopting the Act's preemption clause, Congress invoked the "long history of preemption in maritime safety matters." *Id.* at 20. Boat safety is simply not and has never been a subject of traditional state regulation.

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[23] For example, in two state cases cited by petitioner (Pet. 19-20), the courts held that common law claims based on defectively designed and installed equipment were not preempted by the Boat Safety Act. *Mulhern* v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App. 1988) (defective throttle), and *Rubin* v. *Brutus Corp.*, 487 So.2d 360 (Fla. Dist. Ct. App. 1986) (defective seat). As the Eighth Circuit observed in discussing these decisions, "common law claims asserting liability for defectively designed products that are actually installed may not be preempted." Pet. App. 6.

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In the final analysis, petitioner can offer no credible reason why this Court should review the decision below, which is fully consistent with *Myrick* and follows a long line of federal and state court decisions finding preemption under the Boat Safety Act. Moreover, the Eighth Circuit's conclusion that petitioner's claims are preempted is plainly correct. Petitioner seeks to establish a state common law rule that would require propeller guards on all recreational boats. In the Boat Safety Act, however, Congress gave the Coast Guard plenary authority to make the determination whether to require propeller guards, and the Coast Guard expressly decided — after an exhaustive study — *not* to mandate that item of equipment. Petitioner's common law claim thus conflicts directly and substantially with this expert federal determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1995